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Remedies

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by *Kenneth H. York**

It is a curious circumstance that, although the sole purpose of a lawsuit is to obtain redress of some sort, the remedial aspects of cases are usually shunted to the back of the litigational bus from which they emerge belatedly, casually, and somewhat rumpled. Anyone searching for illuminating bits of remedial lore in California (or any other) advance sheets must be prepared to rummage about among tag-end paragraphs of literally hundreds of civil cases from which such interest as may originally have existed in parties, facts, controversy, strategy, or even style has long since been drained away.

However, remedial considerations are sometimes so strong that they push to the forefront. This is particularly true of cases in which the claimant is afforded, or at least thinks the

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trend of judicial lawmaking is such that there is a chance he *may be afforded*, a choice of substantive law (contract, tort or restitutionary) causes of action based upon the facts stated.

Since remedial problems range in appearance from tag-end paragraphs to main themes, a discussion of court decisions is forced to follow a similiar pattern. It may be tempting at times to focus only upon the main themes, but remedial problems given lesser attention may be equally important, if only to the client's bank account. Accordingly, this review and analysis treats in varying length the remedial problems to which the courts gave varying attention.

Choice of Tort or Contract—Remedial Consequences

In California in recent years, the remedial consequences of being able to choose between a breach of contract or a tort approach has been most graphically presented in actions against insurance companies. In last year's volume of this work[1] a short review was made of those cases wherein a liability insurer had failed to take advantage of the opportunity to settle a third party claim within the policy limits, thereby exposing the insured to judgment liability uncovered by insurance. As there noted, considerable latitude is given the insured insofar as electing to treat the insurer's conduct as a breach of contract or a tort.[2]

The lure of punitive damages undoubtedly induced the plaintiff in *Wetherbee v. United Insurance Co. of America*[3] to add a count in tort to a complaint for damages for breach of a disability insurance contract. That this lure is a peculiarly attractive one may be deduced from the $500,000 exemplary damage award the jury added to $1,050 general damages. On the surface, the wrongful repudiation of a disability insurance contract appears to fall short of the egregious conduct of the liability insurer in declining to settle

1. See *Cal Law—Trends and Developments 1967*, at p. 285.

2. The important case, of course, is Crisci v. Security Insurance Co., 66 Cal.2d 425, 58 Cal. Rptr. 13, 426 P.2d 173 (1967).

3. 265 Cal. App.2d —, 71 Cal. Rptr. 764 (1968).

within policy limits, but the defendant insurer in *Wetherbee* made some collateral representations in writing to induce the insured to withdraw a letter of cancellation. From the tenor of these representations and the company's subsequent inconsistent conduct, the plaintiff was able to establish a tort (deceit) theory that the company had induced the plaintiff to act with no intent to perform on its part. As for the $500,000 punitive damages, the plaintiff suffered a common and ironic failure of too successful advocacy. The case was remanded for retrial because the discrepancy between general and punitive damages suggested passion or prejudice. Parenthetically, there might be a difference between general damages recoverable for breach of the insurance contract here and those allowable in tort, but it is useless to search the case because counsel stipulated the same amount under either approach.

The supreme court in *Reichert v. General Insurance Company of America*[4] has somewhat blunted any thrust toward what might have seemed the ultimate holding in *Wetherbee*, that any nonperformance by an insurer could be both breach of contract and tort. *Reichert* is a peculiarly subtle case, as indicated by the inordinate time it was retained on the calendar for rehearing, the vacation of not one but two prior opinions, and the obviously nonideological split in the final four to three decision—all this attention on whether or not demurrers without leave to amend were properly entered against a second amended complaint. The relevant facts are not complex. Plaintiff owned a motel allegedly valued at $1,500,000 with a first trust deed of $850,000. Policies with a combined coverage of $1,375,000 were issued by the 4 defendant insurance companies. Having sustained fire loss, the plaintiff contended that lack of cash to meet his commitments caused his bankruptcy and the loss of his motel. It may be assumed that settlement of claims under the policies was eventually reached among the insurers, the beneficiary of the deed of trust and the trustee in bankruptcy,[5] thereby dis-

4. 68 Cal.2d 822, 69 Cal. Rptr. 321, 442 P.2d 377 (1968). For further discussion of this case, see Seligson, INSURANCE in this volume.

5. See Kossian v. American National Insurance Co., 254 Cal. App.2d 647, 62 Cal. Rptr. 225 (1967).

posing of plaintiff's claims for the insurance proceeds as such. Plaintiff thought, nevertheless, that his consequential pecuniary injury of bankruptcy and loss of property was not adequately redressed; he was confronted with the problem of asserting a separate personal claim that would not be included among those which passed to the trustee in bankruptcy. His first amended complaint set forth (1) 4 separate counts against the 4 insurers for return of premiums (carefully avoiding reference to the bankruptcy) and (2) 4 separate counts against the 4 insurers for failure to adjust the fire loss promptly, which conduct was in bad faith and constituted fraud and oppression resulting in bankruptcy and causing him to lose his motel. After demurrers were sustained, the plaintiff added a ninth count for bad faith against all defendants alleging that there was an implied promise to adjust losses promptly and fairly, and that contrary to such promise, settlement was not undertaken, and that "[a]s the direct and proximate result and failure to exercise . . . good faith, care, skill, or diligence for the protection of plaintiff's rights, which were entrusted by plaintiff to defendants for protection, and of the defendants' breach of their trust obligations, plaintiff has been damaged in the amount of $1,500,000 plus interest."[6]

It is apparent that plaintiff, by stating counts in quasi-contract and counts for consequential damages only, conceded that the claim for general damages for breach of a contract to pay money had passed to the trustee. It is equally apparent that he tried to state not only a breach of contract and breach of trust, but also some sort of independent, personal, non-transferable tort claim which could not be said to have passed to the trustee in bankruptcy. Despite the further amendments to his complaint, the court concluded that counts 5 through 9 were still basically contractual:

> The embellishments added by the pleader, as for example, that defendant "in doing all of the things as herein alleged, has done them deliberately, fraudulently and oppressively," and that defendant is "guilty of oppression

6. 68 Cal.2d at 828, 69 Cal. Rptr. at 323, 442 P.2d at 379.

and fraud," aside from their obvious conclusionary character, do not derogate from the contractual character of the pleading.[7]

Even the dissenting judges seemed to accept this proposition and concentrated their attention on whether the complaint stated a contractual claim which escaped transfer to the trustee in bankruptcy. Hence, it is clear that California judges are presently unwilling to allow a claimant to shift from breach of contract to tort by mere epithets describing the quality of the breach. Although a man who loses property by a bankruptcy traceable to a lack of funds, in turn occasioned by the "bad faith" and "oppressive and fraudulent" breach of a contractual obligation of a fire insurer, would seemingly attract as much sympathy as one who loses property as the result of a judgment to which he is exposed by the failure of a liability insurer to pay what proves to be a valid claim, there is a gap between the two situations that the courts as of now prefer to maintain.

Lest the point be lost, it should be restated. *Reichert* is a typical case in which the remedial desires necessarily dominated and shaped the entire substantive law aspects of the case, rather than the contrary.

Equitable Remedies

In Personam Nature of Equitable Proceedings

The proposition that "equity acts *in personam*," which is occasionally modified and sometimes derided, reasserted its elemental nature in *Rothschild v. Erda*.[8] The suit was instituted by a special California administrator to quiet title to securities belonging to a decedent. Although quiet title suits

7. 68 Cal.2d at 831, 69 Cal. Rptr. at 325, 442 P.2d at 381. The district court of appeal in one of the vacated opinions [53 Cal. Rptr. 693 at 699 (1966)] put the matter this way: "Appellant apparently assumes in his argument that a contract obligation may be converted into a tort liability by a failure to perform promptly, accompanied by the wish to harass, vex and annoy the other contracting party. The great weight of authority is clearly against this contention."

8. 258 Cal. App.2d 750, 66 Cal. Rptr. 209 (1968).

have come to be regarded as purely *in rem* proceedings, the outcome shows that this is not literally so. In the course of the suit, the court issued an order granting a preliminary injunction restraining a New York administrator of the same estate from instituting in New York any proceedings relative to a claim of title of the securities. Substituted service was made and the New York administrator appeared specially. On appeal, the injunction order was reversed as void for want of personal jurisdiction, since defendant did not reside in California at any time as specified by Code of Civil Procedure section 417.

Enforcement of Equitable Decrees—Remedial Problems

The "Void" Decree Problem

It is easily predictable that *In re Berry*[9] will become a much cited opinion and will encourage collateral attacks on injunctive decrees. Though less predictable, it is still in the realm of speculation that the decision may have a considerable impact upon effective judicial control of group or mob (choose your euphemism) conduct and upon many forms of personal conduct over which equitable jurisdiction has of recent years been assumed to exist. The case developed from an *ex parte* temporary restraining order, issued at the instance of Sacramento County, to prohibit a threatened strike by the Sacramento Chapter of the Social Workers Union. Named were certain officers, 750 individual John Does and 150 John Doe associations. The order was issued pending a hearing on a motion for a preliminary injunction, and read as follows:

> That Defendants and each of them, their officers, agents, servants, employees, representatives and members, and all persons in active concert or participation with them, or in concert among themselves, be restrained and enjoined from doing directly or indirectly by any means, method or device whatsoever any and all of the following things:

9. 68 Cal.2d 137, 65 Cal. Rptr. 273, 436 P.2d 273 (1968). For further discussions of this case see Grodin, LABOR RELATIONS and Leahy, CONSTITUTIONAL LAW in this volume.

a. From ordering or continuing to order, or asking or requesting, or otherwise inducing or attempting to induce any employee of the Plaintiff to cease work for or not to work for the Plaintiff;

b. From intimidating, threatening, molesting or coercing the Plaintiff or Plaintiff's agents, employees, suppliers, contractors, guests or invitees;

c. From striking or engaging in a work stoppage or other similar concerted activity against Plaintiff; and

d. From picketing, and from placing, stationing or maintaining, or causing any picket or pickets to be stationed or maintained, and from causing, participating in or inducing others to participate in any demonstration or demonstrations on any grounds, or that portion of any private or public street which adjoins any grounds, or on any sidewalk which is contiguous to any portion of any private or public street which adjoins any grounds which are owned, possessed or controlled by the Plaintiff and on which are situated any building, buildings or structures of any kind whatsoever which are occupied by Plaintiff and in which employees of Plaintiff are assigned to work.[10]

Union attorneys counseled that the order suffered from constitutional defects and a strike with peaceful picketing began. No attempt was made to obtain a modification of the t.r.o. Arrests were made and charges of criminal contempt under Penal Code section 166 (4) were filed against the petitioners who were later released on bail pending trial. Thus a collateral rather than a direct attack was made on the order by means of a writ of habeas corpus. The supreme court discerned numerous constitutional objections to the t.r.o., declared it void, and sustained the writ as a proper remedy for attack, using the analogy that "a court is without jurisdiction to subject a citizen to criminal prosecution for violation of an unconstitutional *state* or *ordinance*."[11]

10. 68 Cal.2d at 141–142, 65 Cal. Rptr. at 276–277, 436 P.2d at 276–277.

11. 68 Cal.2d at 145, 65 Cal. Rptr. at 279, 436 P.2d at 279.

The basic proposition of the court that the deliberate violation of an equity decree, void on its face, will not subject the violator to penalties for civil or criminal contempt is an entirely acceptable rule as such. However, there may be some element of overkill, because the way the conclusion was reached could have a considerable bearing upon the effectiveness of injunctive remedies in California. Only a few of the possible points for discussion will be here taken up.

In the first place, the opinion in *Berry* recognizes the distinction between void decrees and merely erroneous decrees, which cannot be disregarded with impunity, pending a review to detect the error which is ultimately shown to appear. Void decrees have commonly been regarded as those beyond the power or primary jurisdiction of the court to enter because of lack of jurisdiction over the parties or of the subject matter. The problem of an occasional, flagrantly erroneous decree has been resolved by simply allowing a collateral challenge because the decree grossly exceeds the court's equitable jurisdiction. Perhaps this standard approach would have dealt adequately with t.r.o. in *Berry*—either on the assumption that the subject matter jurisdiction of a trial court does not extend to the issuance of decrees constitutionally invalid on their face, or that at least such decrees are patently and grossly in excess of equitable jurisdiction. In its desire to hold the instant decree void, however, the supreme court chose to reiterate a previous holding which narrowed the concept of the court's power (i.e., primary jurisdiction):

> Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine *stare decisis*, are in excess of jurisdiction.[12]

From the sense in which "jurisdiction" is used in the quotation, the concept expressed comes perilously close to running

12. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715 (1941), cited in 68 Cal.2d at 147, 65 Cal. Rptr. at 280, 436 P.2d at 280.

counter to the rule that erroneous decrees are not void. A decree constitutionally objectionable on its face fits easily within such a concept of want of power, but the concept would unwisely characterize as void the inordinate number of California trial decisions that suspiciously depart from precedent. Moreover, the posture of the supreme court that a departure from "rules developed by the courts and followed under the doctrine of *stare decisis*" exceeds jurisdiction and is thus void may strike some of the legal profession as whimsical.

On a related "jurisdictional" point the opinion may have gone further than necessary. The county advanced an argument based upon *United States v. United Mine Workers*,[13] that the superior court had the power to issue an order preserving the status quo "while . . . in the process of determining the substantial question of its authority to grant the injunctive relief sought, and that the temporary restraining order, as expression of that power, was to be obeyed upon pain of contempt regardless of its constitutional validity as ultimately determined."[14] This argument seems amiss here because the *United Mine Workers*' doctrine may be properly limited to the situation where a court is recognized to have the power to issue an injunction maintaining the status quo while it ascertains facts to determine whether the case is properly before it (the familiar "jurisdiction to determine its own jurisdiction"). Since the attack on the order in *In re Berry* was upon the constitutional deficiency of its language, the question of invalidity was entirely different. The opinion quite correctly distinguished the case of *Signal Oil, etc. Co. v. Ashland Oil, etc. Co.*[15] (which to some extent relied on *United Mine Workers*), sustaining the power of a superior court to issue a t.r.o. that enjoins acts in violation of an agreement subsequently held to be void.

In view of the distinctions between *Berry* and *United Mine Workers*, the *Berry* opinion's inclusion of a quotation from *Witkin* regarding *United Mine Workers*—"Whatever be the

13. 330 U.S. 258, 91 L.Ed. 884, 67 S.Ct. 677 (1947).

14. 68 Cal.2d at 146, 65 Cal. Rptr. at 279–280, 436 P.2d at 279–280.

15. 49 Cal.2d 764, 322 P.2d 1 (1958).

extent to which federal courts apply this doctrine, it is not the law in California"[16]—is gratuitous and may someday give reason for regret (particularly since the cases cited by *Witkin* as authority do not bear directly on the point of *United Mine Workers*).

The justification for the *United Mine Workers*' approach is that it allows a court effectively to maintain the status quo during a transitory phase of litigation and thus permits it to handle in an orderly fashion genuine controversies over its power, regardless of the ultimate decision. The point of *United Mine Workers* is that orders issued for this purpose are within the power of the court and are not void, at least in respect to a citation for criminal contempt. It is wide of the mark to assume that a compilation of quotes to the effect that a violation of a void order will not support a contempt citation somehow establishes a clear-cut rule in California contrary to *United Mine Workers.*

There is indeed a recent case in California cited in neither *Berry* nor by *Witkin,* that appears to conflict with the *United Mine Workers*' approach. In *First National Bank v. Superior Court*[17] the court issued a t.r.o. against a bank, enjoining it from holding a sale under a deed of trust. The bank requested dissolution of the order a short time before the scheduled hour of sale. The court asked for a postponement of the sale to allow it to dispose of other matters and review the bank's authorities. The bank declined and the court refused to dissolve the order. After the sale the court held the bank in contempt and assessed a fine of $500. The appellate court annulled the fine because of a federal statute that "no injunction shall be issued against a (national banking association) . . . before final judgment in any . . . action . . . in any state . . . court."[18] The appellate court said that since the order must fall, all contempt proceedings based on its violation must fall with it. That the court was unhappy

16. 1 Witkin, *Cal. Procedure* (1954), p. 421.

17. 240 Cal. App.2d 109, 49 Cal. Rptr. 358 (1966) cert. den. 385 U.S. 829, 17 L.Ed.2d 65, 87 S.Ct. 65.

18. 12 U.S.C.A. § 91.

with this course of events is made plain by the following language:

> This decision is in no way critical of the trial judge. The rule [federal statute] is little known in the California practice and seems seldom resorted to by the many national banks of this state. It is difficult to understand counsel's rejection of the judge's eminently reasonable request for a two-hour postponement of sale to permit review of petitioner's authorities. We are bound, however, by the federal statute barring interim injunctive relief in all state courts.[19]

There should be no inference that the appellate court was consciously running counter to the *United Mine Workers*' rationale, for it cited no authority whatsoever. In fact, the policy reasons underlying *United Mine Workers* are not strongly presented here. Even in such a weak case, it obviously struck the appellate court as not entirely fit that the order of a trial judge to hold it a minute while he reads the book should be void even though he reads the book accurately and correctly concludes he is not empowered to proceed further.

Had there been a genuine dispute as to whether the bank was a "national" bank or whether there was a "final" judgment, the problem in *First National* would have been much closer to *United Mine Workers.*

The power to decide such underlying issues and to issue orders maintaining the status quo on pain of contempt, while they are being decided, should rest squarely on the necessity for a responsible, effective, and fast litigational process, rather than on "jurisdictional" irrelevancies.

As a matter of fact, the *United Mine Workers*' situation has not really arisen in California; nor has its rationale been examined in the proper context. Until this happens it may be advisable to downplay some recent dicta and consider the question as still open. The power involved is inherently pro-

19. 240 Cal. App.2d at 111, 49 Cal. Rptr. at 360.

cedural—to be neither casually exercised nor casually rejected.

Turning now to the fundamental issue decided in *In re Berry*, it must be noted that the supreme court assumed, at least for purposes of the decision, that certain strike activities by welfare workers could be properly enjoined, but nevertheless held the recited order, in each of its subparts, was infected with constitutional deficiencies—violation of First Amendment guaranties, vagueness, and overbreadth—so pervasive as to preclude the application of the doctrine of severability.

When injunction decrees infringe First Amendment rights alone, they might be salvaged by the device of a partial supersedeas.[20] (In this situation appeal is not available in California.) Tests of unconstitutional vagueness and overbreadth, which have been applied to legislation and now apply to certain equity decrees in California, create drafting problems of a broad dimension. Since a party is now permitted collaterally to attack without taking steps directly to seek a modification, it is impossible, as might be the case with a state statute, to obtain a properly limiting interpretation rendering the decree constitutional. The problem of uncertainty, apart from constitutional considerations, has always been a major one, particularly in connection with mandatory elements in a decree. Now, even in negative decrees, as in *Berry,* the drafter must keep an eye on a voluminous amount of constitutional law cases involving statutes and ordinances. He must do this with considerable attentiveness when handling cases of personal and civil rights, cases with fluid situations, and cases affected by considerable emotion. He must define with specificity, but avoid overbreadth. He gets but one chance. If he is wrong, the attempt is a nullity, and conduct in defiance of the defective order escapes punishment, even though properly controllable and obviously within the generally proscribed area.

Given these considerations, there may be greater hesitancy

20. Sacramento Newspaper Guild v. Sacramento County Board of Supervisors, 255 Cal. App.2d 51, 62 Cal. Rptr. 819 (1967).

to issue equity decrees in cases involving civil rights and personal conduct. It is a reminder that there is a residual validity to equity's traditional hesitancy to depart from the protection of only property rights—not because there might be a deficiency in humaneness, but because the harsh equitable remedies are peculiarly unsuited to the detailed regulation of personal conduct among human beings.

Contempt—Civil or Criminal—Jury Trials

The distinction between civil and criminal contempts, puzzling at best, is further obscured in California by reason of statute. Contempt proceedings in this state may be pursuant to the Penal Code as in *Berry* or to the Code of Civil Procedure sections 1209–1222. Section 1209 lists eleven acts or omissions constituting contempt, ignores any traditional classifications, and indiscriminately lumps violations of equity decrees (civil contempt) with aberrant behavior in and out of court. Section 1219 allows imprisonment for the omission to perform an act which is still within one's power to perform, thus providing for the usual method of civil contempt of the disobedience of mandatory equity decrees. Otherwise the procedure and penalties for all forms of contempt, under the Code of Civil Procedure sections, including the disobedience of negative injunctions, are the same.

In a leading case,[1] the supreme court said:

> The distinction between civil and criminal contempt is important in the federal and some state courts because there are procedural differences, particularly in the safeguards afforded the citee . . . [citation omitted] . . . . But in California the proceedings leading to punishment for failure to obey a decree (criminal contempt) and to imprisonment until the omitted act is performed (civil contempt) are exactly the same [citation omitted]. Although the sections which provide the procedure for both kinds of contempt are in Part III

1. City of Culver City v. Superior Court, 38 Cal.2d 535, 241 P.2d 258 (1952).

> of the Code of Civil Procedure, which is entitled "Special Proceedings of a Civil Nature," contempt proceedings are said to be "criminal in nature" and those procedural rights and safeguards which are appropriate to criminal contempt proceedings are also afforded, in California, to civil contempt proceedings.[2]

Relying on the foregoing, the court of appeals, second district, division three, in *Little v. Superior Court*[3] annulled an order adjudging a defendant in contempt for failure to obey a court directive to sign consent to certain depositions. Conducting the review (on certiorari) as though criminal procedural safeguards were required, the court found deficiencies as to specificity, intent, and quantum of proof.

Against this background one would expect a jury trial in all contempt cases in this state, but two cases have held otherwise. In *United Farm Workers Org. Comm. AFL-CIO v. Superior Court,*[4] the defendants violated a negative injunction with respect to picketing and were ordered to show cause why they should not be held in contempt. The court of appeal, fifth district, refused a writ of prohibition to prevent the hearing from proceeding without a jury. Citing three recent United States Supreme Court decisions,[5] the court held that the violation was civil, not criminal, and that no jury trial was constitutionally required.

A few days later in a routine civil case concerning a violation of a preliminary injunction,[6] the court of appeal, second district, third division (which decided the *Little* case, supra) also cited the same three Supreme Court decisions and also held there is no right to a jury trial in proceedings under Code of Civil Procedure sections 1209–1222, but on the ground

2. 38 Cal.2d at 541, 241 P.2d at 261.

3. 260 Cal. App.2d 311, 67 Cal. Rptr. 77 (1968).

4. 265 Cal. App.2d —, 71 Cal. Rptr. 513 (1968).

5. Duncan v. Louisiana, 391 U.S. 145, 20 L.Ed.2d 491, 88 S.Ct. 1444 (1968); Bloom v. Illinois, 391 U.S. 194, 20 L.Ed.2d 522, 88 S.Ct. 1477 (1968); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 20 L.Ed.2d. 538, 88 S.Ct. 1472 (1968).

6. Pacific Tel. and Tel. Co. v. Superior Court, 265 Cal. App.2d —, 72 Cal. Rptr. 177 (1968).

that the penalties imposed were so limited that the contempt charged fell within the category of a *petty* offense.

Thus we can say that a defendant who violates an equity decree in California is probably not entitled to a jury trial if cited for contempt under sections 1209–1222, but we cannot yet with authority say why. In a sense, both appellate courts are correct in their interpretation of the Supreme Court decisions. The fifth district opinion is correct in saying that those decisions held that no jury trial is constitutionally required for *civil* contempt and correct in saying that its case is *civil* contempt as most courts (apart from California) would view it. The second district opinion is correct in saying that the Supreme Court cases hold that the Constitution does not require a jury trial for petty criminal contempt cases, and the opinion is therefore consistent with its view of California precedent.

Support Orders—Contempt

Under merged procedure, equity decrees for the payment of money are enforceable both through contempt (within limitations as to imprisonment for debt) and through means used to collect ordinary legal judgments. Support orders are instances in point. In *Lyon v. Superior Court*,[7] the supreme court disagreed with the court of appeal and upheld a contempt order against a father in arrears in his support payments. The trial court's finding of an ability to pay, at least in part, was considered enough to sustain the order: "Ability to comply with an order does not necessarily mean the ability to fully and completely comply."[8] The order in question did, however, contain a peculiar provision:

> The Defendant, having been found guilty of contempt of court on six counts . . . is hereby ordered to serve five days in the County Jail on each count to run consecutively. The Court further orders that this contempt

7. 68 Cal.2d 446, 67 Cal. Rptr. 265, 439 P.2d 1 (1968).

8. Bailey v. Bailey, 77 S.Dak. 546, 95 N.W.2d 533 (1959), cited in 68 Cal. 2d at 451, 67 Cal. Rptr. at 268, 439 P.2d at 4.

> may be *paid* [italics added] by the payment of $100.00 for each five days to be served.[9]

The court of appeal, which found the order in general to be void for uncertainty, considered this provision to be meaningless, providing neither punishment under Code of Civil Procedure section 1218 nor coercion under section 1219.[10] The supreme court, however, gave meaning to the section by interpreting the *paid* to mean "purged." Neither section 1218 nor section 1219 applies to the conditions whereby the defendant may purge himself of contempt.

In two other cases[11] involving child support orders the supreme court emphasized that, beyond contempt proceedings, no special advantages would accompany this type of equity decree in California. Both cases derived from attempts, in effect, to garnish county or city pension moneys due the judgment debtors as retired employees, but the court held that such funds were by statute exempt from execution, garnishment, attachment or other process of court without any equitable exceptions as to child support decrees. In fact the court in one case felt so strongly about it that it held the trial court had no power to issue the order and allowed the peremptory writ of mandamus in lieu of appeal.[12]

Equity Power—Setting Aside Default Judgments

Conflicting opinions were written by the second and fifth district courts of appeal as to whether the municipal court has the power to set aside a default judgment because of extrinsic fraud or mistake upon a motion made six months after the default. According to the fifth district opinion,[13] a separate equity suit in the superior court is required. The

9. 68 Cal.2d at 449, 67 Cal. Rptr. at 267, 439 P.2d at 3.

10. See Lyon v. Superior Court, 64 Cal. Rptr. 357 (1967).

11. Ogle v. Heim, 69 Cal.2d 7, 69 Cal. Rptr. 579, 442 P.2d 659 (1968); Miller v. Superior Court, 69 Cal.2d 14, 69 Cal. Rptr. 583, 442 P.2d 663 (1968).

12. Miller v. Superior Court, 69 Cal. 2d 14, 69 Cal. Rptr. 583, 442 P.2d 663 (1968).

13. Strachan v. American Insurance Co., 260 Cal. App.2d 113, 66 Cal. Rptr. 742 (1968).

second district in a later case[14] pointedly disagreed. The supreme court, however, ultimately has sided with the fifth district position.

Default judgments in the superior court entered under the same circumstances may be alternatively attacked by motion[15] or by a separate suit in equity.[16] The relief granted by way of motion has usually been justified as within the "inherent equity power" of the superior court. There has been little question that default judgments entered in the municipal court may be avoided for extrinsic fraud or mistake in a separate equity suit filed in the superior court.[17] But does the municipal court have the power to accomplish the same result by motion? The *Strachan* case (5th district) held no, because the *equitable* relief requested was not within the subject matter jurisdiction (power) of the municipal court as outlined in section 89 of the Code of Civil Procedure, although it was conceded that otherwise the matter was one which could be practically handled by the municipal court. The *Bloniarz* case (2d district), after noting the incongruity which arises if in matters over $5000 relief from default may be had by motion, but for matters less than $5000 a separate suit in equity in a different court is required, held that the municipal court has the inherent power to settle the matter on a motion to set aside the default, even after a six-month lapse.

The difficulty arises from a language trap. The superior court's power to set aside defaults on motion has been habitually described as an "inherent *equity* power." To confer the same power by court decision on the municipal court does indeed seem to be a judicial extension of its subject

14. Bloniarz v. Roloson, 263 A.C.A. 139, 69 Cal. Rptr. 213 (1968). (Opinion later vacated, see 70 Cal.2d —, 74 Cal. Rptr. 285, 449 P.2d 221 (1969).)

15. E.g., Palmer v. Moore, 266 Cal. App.2d —, 71 Cal. Rptr. 801 (1968); Sullivan v. Sullivan, 256 Cal. App.2d 301, 64 Cal. Rptr. 82 (1967); Orange Empire National Bank v. Kirk, 259 Cal. App.2d 347, 66 Cal. Rptr. 240 (1968) (attorney's misconduct rather than fraud or mistake).

16. E.g., Higley v. Bank of Downey, 260 Cal. App.2d 640, 67 Cal. Rptr. 365 (1968); Hayes v. Rich, 255 Cal. App.2d 613, 64 Cal. Rptr. 36 (1967) (this opinion states the attack is direct, although in fact it should probably be called collateral).

17. See Bernath v. Wilson, 149 Cal. App.2d 831, 309 P.2d 87 (1957).

matter jurisdiction relative to equity causes beyond that allowed by the legislature. The court of appeal's opinion in *Bloniarz* need not, however, be so interpreted. The power to avoid its own default judgments at any time for fraud or mistake, provided there is a proper hearing, can be regarded as inherent without necessarily saying it is equitable—governed by equitable principles, yes.

The supreme court disagreed with the court of appeal in *Bloniarz*[18] (as well as with the comments which have just been made), stating that the power to set aside a default judgment for extrinsic fraud or mistake is "distinct from the power to amend and correct records"[19] as conferred on all courts by Code of Civil Procedure section 128. According to the court, the first power is equitable and inheres in only courts of general jurisdiction; the second power is primarily administrative and inheres in all courts of record.

It is arguable that the inherent power of a municipal court is controlled solely by section 128. That section merely defines a court's incidental powers. The power to set aside a default judgment inheres in the powers conferred on the municipal court by section 89 of the Code of Civil Procedure. To resolve the conflicting interpretations in favor of a municipal court exercising such a power, an amendment to section 89 should be made.

Ancillary Equitable Remedies—Maintaining Litigational Status Quo

The usual diverse problems in framing suitable temporary orders of a discretionary nature were encountered in 1968 with no striking developments. In *Continental Baking Co. v. Katz*[20] a temporary injunction against interfering with an easement came under scrutiny. Although it appeared that some documentary evidence had been improperly admitted, the supreme court sustained the injunction. The exclusion

18. 70 Cal.2d —, 74 Cal. Rptr. 285, 449 P.2d 221 (1968).

19. 70 Cal.2d at —, 74 Cal. Rptr. at 288, 449 P.2d at 224.

20. 68 Cal.2d 512, 67 Cal. Rptr. 761, 439 P.2d 889 (1968).

of such evidence may have weakened the probability of the plaintiff's ultimate success, but the issue of relative hardship, weighted in plaintiff's favor, was not affected.

That the court may be in for a lengthy period of supervision of temporary injunctions where personality factors dominate litigation was again illustrated in *Jones v. Fakehany*.[1] Dr. Fakehany founded the Highland Medical Clinic a quarter of a century ago. His death triggered a dispute between his widow and his former medical associate, who instituted proceedings in 1966 for liquidation of their partnership. Skirmishes for physical control of the premises, for the possession of records, and for the clinic's patients led to a series of court orders attempting to keep this knotty complex of problems beyond disentanglement. Two years later the court of appeal in the cited case was called upon to consider modification of an order containing several directives. The court deemed it inadvisable to formulate a "final" order even after this length of time, gave some sage advice, and remanded with directions to modify pursuant to the advice.

The difference between a conservatorship and a receivership was stated as follows in *Hillman v. Stults*,[2] wherein a convict sought protection of his property: "A receiver is a neutral court official while a conservator is a representative of a party."[3] Since an equity court has inherent power to appoint a receiver, it may, when proper, do so without duplication, in a case where a conservatorship exists. Although it mentioned a trial of title, the court held that the case was basically no more than an equity suit to establish and enforce an express trust, so no right to a jury trial existed.

Declaratory Judgments

Last year's article on remedies demonstrated that the declaratory judgment as a test for the constitutionality of penal ordinances is often treated erratically by the courts. One

1. 261 Cal. App.2d 298, 67 Cal. Rptr. 810 (1968).

2. 263 Cal. App.2d 848, 70 Cal. Rptr. 295 (1968).

3. 263 Cal. App.2d at 875, 70 Cal. Rptr. at 311.

justification for such treatment was offered this year by *Holden v. Arnebergh*.[4]

Plaintiffs, in the business of selling books, were arrested for selling obscene material. They brought an action for declaratory relief and for an injunction against the city attorney. The trial court sustained demurrers to the plaintiff's complaint. The court of appeal, second district, affirmed the judgment on the pleading.

Plaintiff advanced two arguments on appeal: (1) that the officers were required to obtain warrants prior to the arrest and seizure and (2) that "it is now settled that an action for declaratory judgment will lie to determine the alleged obscenity of a book or other material."[5] The court rejected the first argument on the ground that the plaintiffs had an adequate remedy at law by virtue of sections 1539 and 1540 of the Penal Code. That there was an adequate remedy at law also met the plaintiff's second contention—this time, by virtue of a timely motion to suppress that "might well have removed the several materials from judicial consideration, thus ending the People's case."[6]

Contrasted to *Holden* is *Landau v. Fording*,[7] in which the court of appeal, first district, assumed the plaintiffs had access to declaratory relief, although it did decide that the material was obscene and thus denied relief. But *Holden* is distinguishable from *Landau* in that the plaintiff in *Landau* had not been arrested prior to bringing the action. This distinction justifiably controlled the different results in the two cases.

Remedies for Injuries to Tangible Property Interests[8]

Real Property—Remedies to Determine Title or Possession

A quiet title suit, being equitable, is subject to the defense

4. 265 Cal. App.2d —, 41 Cal. Rptr. 401 (1968).

5. 265 Cal. App.2d at —, 71 Cal. Rptr. at 403.

6. 265 Cal. App.2d at —, 71 Cal. Rptr. at 404.

7. 245 Cal. App.2d 820, 54 Cal. Rptr. 177 (1966), affirmed memorandum, 388 U.S. 456, 18 L.Ed.2d 1317, 87 S.Ct. 2109 (1967).

8. Heretofore discussion has been primarily limited to procedural consid-

of laches, but the very nature of the suit, i.e., to obtain a declaration of status, makes the defense rarely applicable. As pointed out in *Gerhard v. Stephens*[9] the party asserting the defense must demonstrate that he was in adverse possession of the contested property during the period of delay.

Recovery of possession by a landlord generally takes the form of summary proceedings in unlawful detainer. Statutory treble damages totaling $32,000, plus attorney's fees (as provided under the lease) were awarded in *Erbe Corp. v. W & B Realty Co.*[10] despite the unusual fact that the defendants had relinquished physical possession before trial, without conceding their lack of right to possession.

—Damages for Trespass

Confusion exists about the meaning of the expression "mitigation of damages" because of the tendency to use it to describe disparate concepts and also to speak unnecessarily of a "duty" to mitigate. The defendant in a defamation case, for example, may "mitigate" damages by publishing a retraction. The same defendant might also seek to introduce evidence in "mitigation" by showing the plaintiff had no reputation to destroy. The plaintiff cannot recover for damages which he could reasonably limit, and this too is referred to as "mitigation," although it can be more cogently described as "the doctrine of avoidable consequences."

There is some discussion on this point in *Green v. Smith;*[11] the court made unmistakably clear the nature and application of the avoidable consequences rule, even though it did lapse into using the broad term "mitigation." In *Green* the defendant intentionally (but not maliciously) broke a concrete irrigation pipeline supplying plaintiff's nursery for ornamental trees which were approaching harvest. Plaintiff attempted

erations in pursuit of the proper remedy. The article now turns to a discussion of remedies in context of substantive law.

9. 68 Cal.2d 864, 69 Cal. Rptr. 612, 442 P.2d 692 (1968). For further discussion of this case, see Friedenthal, CIVIL PROCEDURE in this volume.

10. 255 Cal. App.2d 773, 63 Cal. Rptr. 462 (1967).

11. 261 Cal. App.2d 392, 67 Cal. Rptr. 796 (1968).

to irrigate by constructing ditches; his first attempt failed and the second saved nineteen rows of trees. Twenty-five rows, worth $17,000, were lost. In a nonjury trial it was found that by expending $600 plaintiff could have brought in water by renting portable equipment or by running a line to a fire hydrant. Hence, damages were held limited to $600. The appellate court reversed on the matter of damages. The plaintiff, of course, could not recover damages he could *reasonably* have avoided by an expenditure not "disproportionate to the loss sought to be avoided."[12] At first glance, an expenditure of $600 to save $17,000 would not seem disproportionate or unreasonable. However, the appellate court correctly pointed out that the reasonableness of the plaintiff's actions is not to be judged by hindsight or by standards applicable to a genuine "duty" which might be invoked in other areas of the law. Confronted with an emergency, the plaintiff took measures to avoid the consequences of defendant's intentional wrong. That other measures would later seem more rational does not control the reasonableness of conduct which satisfies the legal requirements of "avoidance of consequences."

— *Encroachments and Nuisances*

The legal remedy of self help plus damages was held preferable to the equitable mandatory injunction in a somewhat unusual encroachment case, *City of Berkeley v. Gordon*.[13] The city, while reconstructing a street, encountered a basement built 65 years previously, extending from defendant's building into the street area. Since there was no impairment of normal street usage, and there was an inference of consent by the city, the basement was held to be merely an encroachment rather than a public nuisance, abatable under California Civil Code section 3491. Although other factors also justified the discretionary denial of equitable relief in favor of damages, the fact that the plaintiff had the requisite equipment on the site, plus the difficulties inherent in supervising mandatory construction decrees, alone warranted the denial.

12. 261 Cal. App.2d at 396, 67 Cal. Rptr. at 800.

13. 264 Cal. App.2d —, 70 Cal. Rptr. 716 (1968).

A court that has undertaken equitable control of a public nuisance may properly issue injunctions against the bringing of further private nuisance suits to prevent impairment of its orders and to avoid conflicting regulations and vexatious litigation. So held *Rynsburger v. Fertilizer Co-op, Inc.*[14] Such an injunction is no more than a modern example of the historic equity bill of peace. A side issue of laches was raised in *Rynsburger* because the private suit had been allowed to proceed to the point where a trial date had been set before the injunction was sought; but the defense was rejected on the ground that the delay was insignificant in point of time.

Competition between two adjacent enterprises offering food, drink, gas, etc. along a frontage road to Highway 99 in Tulare County had escalated to the point of erection of spite fences, diversionary road signs, and other harassing devices, and the court held such activities to be a nuisance warranting an injunction, plus damages reflected by loss of profits in *Hutcherson v. Alexander.*[15] Since both plaintiff's and defendant's businesses were relatively new and had been established within a few weeks of each other, the problem of determining lost profits was, as is frequently the case,[16] a difficult one. The trial court adopted the device of issuing the injunction and then retaining jurisdiction to determine damages based on further experience in the operation of the business. The appellate court, however, disapproved of this remedial technique. While agreeing that an equity court after issuing an injunction may retain jurisdiction to later modify the decree, it held that in bifurcated cases, the damage issue should not be similarly held back pending developments. If the determination of lost profits at trial is merely difficult, the court should do the best it can; if too speculative, the court should award only nominal damages.

14. 266 Cal. App.2d —, 72 Cal. Rptr. 102 (1968).

15. 264 Cal. App.2d —, 70 Cal. Rptr. 366 (1968).

16. The problem is more frequently presented in breach of contract cases. Cf. cases cited infra under the subheading *Contracts for the Sale of Chattels—Damages—Lost Profits.*

Remedies

Personal Property—Specific Restitution

Claim and delivery is a statutory provisional remedy invocable when chattels are wrongfully withheld. A procedural point was clarified as to this remedy in *American Machine & Foundry Co. v. Pitchess.*[17] Code of Civil Procedure section 509 allows the plaintiff (subject to procedures not here relevant) "at any time *before answer,* to claim the delivery" of his property (emphasis added). The plaintiff had delivered the necessary papers to the sheriff, but the sheriff had not picked up the property before the defendant filed an answer. The court held that plaintiff had "claimed" the property within the meaning of the statute and issued a mandamus to the sheriff.

Excessive Attachments of Property—Abuse of Process and Malicious Prosecution—Measure of Damages

In *Templeton Feed and Grain v. Ralston Purina Co.*[18] the defendant attached a flock of turkeys in the possession of a grower purportedly by virtue of rights to after-acquired property under a chattel mortgage. The turkeys were actually the property of the plaintiff under separate financing arrangements. To secure the release of the turkeys, plaintiff paid $60,738.56, the amount of the grower's debt to the plaintiff. The plaintiff filed a tort claim for abuse of process, and added a common count in assumpsit that indicated a remedial theory of legal restitution of moneys paid under duress. (The court of appeal properly rejected the ancient contention that the addition of an assumpsit count "waived" the other counts in the complaint.) The plaintiff requested submission of a punitive damages issue to the jury, but the trial court refused the request. However, an issue of mental anguish was allowed to go to the jury, which then returned a verdict of nearly $111,000. The trial court thereafter issued a condi-

17. 262 Cal. App.2d 490, 68 Cal. Rptr. 814 (1968).

18. 62 Cal. Rptr. 169 (1967) a court of appeal opinion vacated by 69 Cal.2d —, 72 Cal. Rptr. 344, 446 P.2d 152 (1968). Reference is made in the discussion to both the prevailing and the vacated opinions in order to present the handling of the damages issues more clearly.

tional order for a new trial unless plaintiff consented to a reduction to $67,000. The plaintiff consented and defendant appealed.

At this point the judgment still included an item of $6,261.44 more than out-of-pocket expenditures that could be attributed to only mental anguish. But both the supreme court and the court of appeal pointed out that the plaintiff as a corporation could not sustain mental anguish. At the same time, both agreed that it was erroneous to exclude the issue of punitive damages from the jury. Nevertheless, by electing to accept $67,000 the plaintiff had arguably foregone an award of punitive damages. Should the case be unconditionally remanded for a new trial on the damage issue? The court of appeal decided remand unnecessary if defendant would consent to the judgment for $67,000. Otherwise, a new trial would be ordered on all amounts above $60,738.56, and the defendant would assume the risk of having the punitive damage issue submitted to the jury. The supreme court, allowing the defendant no such option, reversed for a new trial on the entire damage issue, both compensatory and punitive, and vacated the intermediate court's opinion.

A side issue in *Templeton Feed* relates to the effect of plaintiff acting on advice of counsel. It was noted in the court of appeal opinion that outside of California this point has been considered as evidence in mitigation of damages, but not as a defense to the action. In California the point arose in a *malicious prosecution* case[19] where action on advice of counsel was held to be a defense to the action as long as all facts are fully disclosed to the attorney. Assuming, without deciding, that this holding applies to abuse of process, the court in *Templeton* disposed of the problem by simply observing that the record did not sustain the defense as stated. There the matter rests.

The use of the declaratory relief technique in an action for malicious prosecution is hardly to be expected, but this remedy was appropriately applied in *Munson v. Linnick.*[20]

19. Moore v. Durrer, 127 Cal. App. 759, 16 P.2d 676 (1932).

20. 255 Cal. App.2d 589, 63 Cal. Rptr. 340 (1967).

One substantive requirement for this tort is the termination of the so-called "prosecution" favorable to the person later seeking redress. In the *Munson* case, part of the pattern of malicious prosecution charged against defendant, a lawyer, was the violation of a tacit agreement with opposing counsel not to take a default in the highly questionable action that he, the defendant, had initiated. Defendant, however, not only caused a default to be entered, but also allowed a year to pass before taking action to enforce the judgment, thus precluding a motion to set aside under section 473 of the Code of Civil Procedure. Levy and execution on the plaintiff's property was then obtained.

Plaintiff filed the present action to set aside the default judgment, to recover the proceeds of the levy plus punitive damages, and to obtain a declaration of rights in the premises. Treated as an action for malicious prosecution, the point was made that, at the time the suit for declaratory relief was filed, the default judgment was technically still in effect, so the "prosecution" could not be said to have yet ended favorably to the plaintiff. The declaratory judgment suit, however, is equitable in nature and a court of equity can make a complete determination of the controversy according to the facts as they exist at the time of the decree. An award composed of the amount taken under the wrongful judgment plus interest, expenses, and punitive damages, may properly be made as an incident of the declaratory relief action.

The remedy for excessive attachment where the underlying proceedings are valid is an action for abuse of process rather than an action for malicious prosecution, which is proper when the attachment is pursuant to an underlying action maliciously instituted without proper cause. So held the supreme court in *White Lighting v. Wolfson.*[1] In the normal situation, therefore, the claim arising from excessive attachment may be asserted in the primary action itself.

1. 68 Cal.2d 336, 66 Cal. Rptr. 697, 438 P.2d 345 (1968).

Money—Diversion of Proceeds of Insurance Policies

In *Cramer v. Biddison*[2] the court of appeal in a two-to-one decision found appropriate grounds for a constructive trust on insurance proceeds, but then proceeded to nullify the practical reasons for doing so. As part of a divorce settlement, the husband had agreed to carry insurance policies amounting to $45,000 payable to the wife but specifically for the protection of the children during minority. The husband, without the wife's knowledge or consent, had changed the beneficiary on all but $12,000 of the policies to his estate. He died before the children reached majority. The executors received the moneys, and *after* receiving notice of the wife's claim under the contract paid creditors' claims with the proceeds. In this suit by the wife against the executors, the majority recognized the propriety of a constructive trust amounting to $3,000 and conceded the rule that property not properly part of the decedent's estate should not be applied to the decedent's debts. However, the majority thought the executors could, with impunity, treat the alleged trust funds as an asset until judicially determined otherwise. Their conclusion seems contrary to comment (b) of section 178 of the Restatement of Restitution.

"What were the executors supposed to do between the notification by [the wife] that she claimed the proceeds and the bringing of her action to enforce her claim [a period of two years]?"[3] was the rhetorical proposition of the majority. The dissenting judge answered readily, "The executors would have been well advised . . . to have filed in the probate proceedings a petition for instructions."[4] Interpleader might also have been an answer.

2. 257 Cal. App.2d 720, 65 Cal. Rptr. 624 (1968).

3. 257 Cal. App.2d at 727, 65 Cal. Rptr. at 628.

4. 257 Cal. App.2d at 729, 65 Cal. Rptr. at 629.

Remedies for Injuries to Intangible Property Interests

Security Interests—Damages

The measure of damages for negligently causing the loss of a security interest accompanying a promissory note is obviously the difference in value between a secured and unsecured note. For purposes of computation, what is the value of a real property purchase money note in California, given the effect of the anti-deficiency statute?[5] In *Howe v. City Title Insurance Co.*[6] the plaintiff had a junior trust deed secured by such a note. However, the note was guaranteed. The defendant negligently failed to record a request for notice of default and sale under a prior trust deed, with the result that plaintiff's security interest was wiped out on foreclosure since he was denied an opportunity to cure the default. The property was sufficiently valuable to cover the plaintiff's junior lien, so the secured value of the note was its face value. The unsecured note was deemed valueless because of the anti-deficiency statute, despite the guaranty. The court pointed out that the guarantor and his wife were having trouble meeting payments on two other trust deeds and that the guarantor had an unsatisfied judgment for $6,000 against him outstanding. This evidence sufficed to establish uncollectibility without the necessity of suing on the guaranty to establish damages.[7]

Business Interests—Trade Secrets and Trade Names

The cases decided in 1968 added little that is worthy of extensive note on the protection of interests in trade secrets and names, afforded by either equity decrees or damages. In *King v. Pacific Vitamin Corp.*[8] equitable relief against a wholesale drug salesman and a competing employer who hired him from plaintiff's employ was denied because the salesman's

5. Cal. Code Civ. Pro. § 580b.

6. 255 Cal. App.2d 85, 63 Cal. Rptr. 119 (1967).

7. For a discussion of restitutionary considerations in respect to security interests, see American Savings & Loan Assn. v. Leeds, 68 Cal.2d 611, 68 Cal. Rptr. 453, 440 P.2d 933 (1968).

8. 256 Cal. App.2d 841, 64 Cal. Rptr. 486 (1967).

activities did not rise to the level of protectibility encompassed by the so-called "route" cases in which employees operate routes for customers whom they supply with such things as laundry and linens, ice, bread, milk. In *Diodes, Inc. v. Franzen,*[9] demurrers to the third amended complaint were sustained for inadequate pleading; the plaintiff was unable to state other than conclusionary facts concerning alleged "secret processes" or to aver with particularity special damages, in the nature of loss of profits or goodwill (or the casual connection between defendant's conduct and plaintiff's loss), sufficient to support a count of unfair competition.

The court of appeal[10] reversed a trial court decision granting equitable protection to the name "Look" on a magazine—the defendant was publishing a magazine called *Nude Look*—because the established facts did not indicate consumer confusion. Apart from the economic aspects, it is difficult to say whether the plaintiff publishers should be flattered or unflattered by the bit of modern social commentary implicit in this decision.

Remedies for Wrongful Death

The mitigating effect of the remarriage of a widow on whose behalf a wrongful death action has been brought was raised in two cases in 1968, *Cherrigan v. City and County of San Francisco*[11] and *Barth v. B. F. Goodrich Co.*[12] In both, evidence of the remarriage was held to be properly excluded, and in *Cherrigan* it was further held that the widow could not be compelled to amend her complaint so as to reveal her current married name. Also in *Cherrigan*, that the co-plaintiff, a minor child, was conceived before marriage was also withheld from the jury. The unfavorable attitude toward this type of mitigating evidence stems from *Benwell v. Dean.*[13]

9. 260 Cal. App.2d 244, 67 Cal. Rptr. 19 (1968).

10. Cowles Magazine & Broadcasting, Inc. v. Elysium, Inc., 255 Cal. App. 2d 731, 63 Cal. Rptr. 507 (1967).

11. 262 Cal. App.2d 643, 69 Cal. Rptr. 42 (1968).

12. 265 Cal. App.2d —, 71 Cal. Rptr. 306 (1968). For further discussion of this case, see Moreau, TORTS, in this volume.

13. 249 Cal. App.2d 345, 57 Cal. Rptr. 394 (1967).

Any distinction between the "possibility" and the "fact" of the widow's remarriage is openly rejected in California. The rationale is that the evidence is speculative in either case and the evidence of actual remarriage removes speculation only as to the event and not as to the mitigating consequences. However, the court in *Cherrigan* tolerated the testimony of a professional sociologist in response to hypothetical questions regarding the probable success or failure of the plaintiff's marriage to the decedent, taking into consideration such factors as age, length of acquaintance, disparity of religious faith, premarital sexual relations, stability of parents' marriages. The estimated failure rate according to this witness was 25 percent in the United States, 50 percent in California, and 70 percent in Marin County. To a layman, it might appear unrealistic to regard the projections of a sociologist as to the future success of an abruptly terminated 35-day marriage as less speculative, relative to the pecuniary loss to the widow, than the uncontrovertible fact of her present remarriage. Perhaps it would be more logical to consider the California exclusionary rule of the widow's remarriage as simply an application of the "collateral source" rule of tort damages in a wrongful death case. As a sidelight, the defendant in *Cherrigan* presented an affidavit by a juror that the sum awarded had not been discounted to present value, but the court refused to permit the verdict to be impeached in this fashion.

Barth makes it clear that a product liability case falls under the terms of the California wrongful death statute. The point is important in respect to the defense of contributory negligence. Although liability based purely on contract has been held not to support a wrongful death action,[14] it has been recognized for some years that liability for breach of warranty is covered by this state's wrongful death act.[15] Some authority to the contrary exists elsewhere, but the *Barth* holding as to strict liability of manufacturers is in accord with the recognized trend.

14. Moxon v. Kern County, 233 Cal. App.2d 393, 43 Cal. Rptr. 481 (1965).

15. Hinton v. Republic Aviation Corp., 180 F.Supp. 31 (1959).

Remedies for Deception

Deceit—Damages

The "out of pocket" rule measuring damages for deceit (section 3343 of the Civil Code) was applied in *Ach v. Finkelstein*[16] in such a way as to display the inherent unwieldiness of the computation of damages under that rule—it is even worse under the "benefit of the bargain" rule—when the transaction involves large total sums as compared to the amount of damage actually resulting. The plaintiffs paid $350,000 for rental properties, being given the false impression that the units were under 12-month leases, whereas in fact rental concessions had been granted. As a practical matter this compelled further concessions reducing anticipated income. To apply the out-of-pocket rule it was deemed necessary to determine the actual value of the apartment house. Various appraisals were introduced in evidence. One defendant said $374,650; another, about $370,000. One of defendant's experts estimated $360,000. A second gave $346,500 to $356,500 on a market data and comparative approach. He also stated $337,960 on an income evaluation approach and the fair market value approach. Plaintiffs' expert appraised the property at $275,000 on the market data approach, $278,750 on the cost approach, and $273,500 on the income approach. The trial court, without a jury, decided on $340,000, an amount to which no one had testified, and awarded $10,000 damages, which was affirmed on appeal. The case illustrates how pointless it is to require a jury or judge to wrestle with wildly discrepant estimates amounting to over a third of a million dollars, when the true focus should be the deficiencies in represented income, amounting to but a relatively few thousand dollars.

Fraud—Rescission—Allowable Delay

In *Wilke v. Coinway, Inc.*[17] plaintiffs were induced by misrepresentations of income potential to purchase some coin-

16. 264 Cal. App.2d —, 70 Cal. Rptr. 472 (1968).

17. 257 Cal. App.2d 126, 64 Cal. Rptr. 845 (1967).

operated machines intended to test the operator's reflexes. One of the defendant's contentions was that the plaintiffs' reaction time was a bit slow insofar as rescission requirements are concerned. It took five months before the lack of income potential was discovered, four months before an attorney was consulted, and another month before action was taken. The plaintiffs' delay was held not to be undue since there was no indication of prejudice. Plaintiffs' case was bolstered by the recognition of their inexperience and credulity. In passing it might be pointed out that whether or not the defendant is prejudiced by the delay is only one factor; the other concerns whether the delay is, in fact, an election by plaintiffs to affirm.

Fraud in Secured Land Sale Transactions—The Relevance of the Anti-Deficiency Statutes to the Remedy

A way may exist around the provisions of section 580d of the Code of Civil Procedure barring a deficiency judgment on a secured note after a private sale of the property at which the security holder purchased. The way, given the requisite supporting evidence, is to rescind the promissory note for the borrower's fraudulent representations of the nature or value of the security.[18] Thus the lender may recover the full amount of the loan on a restitutionary theory, plus consequential damages which include prior litigation expenses including attorney's fees. Likewise, the single action statute is no bar.

A more perplexing situation confronted the defrauded lender in *American Savings and Loan Assoc. v. Leeds.*[19] Here the lender advanced $85,000, secured by a trust deed, against the purchase price of $122,500 of a house falsely represented by the seller to be on unfilled ground. Both the lender and buyer were victims of the fraud. The house collapsed. The security was deemed worthless or close to it.

The buyer sued the seller and reached a settlement for an unknown sum; the lender was excluded from these negotiations. The lender thereupon brought the present action to recover the entire amount of the purchase money loan and to

18. See Kass v. Weber, 261 Cal. App. 2d 417, 67 Cal. Rptr. 876 (1968).

19. 68 Cal.2d 611, 68 Cal. Rptr. 453, 440 P.2d 933 (1968).

subject to a trust in its favor the moneys (whatever sum this might be) rebated by the seller to the defendant-buyer. (The seller was originally made a party, but disappeared from the proceedings—probably to reappear in separate litigation.) Plaintiff relied on provisions in the trust deed that the defendant "keep the property in good condition and repair" and give the lender a right to any award for physical damage to the property. A demurrer was sustained by the trial court whose ruling was upheld at all appellate levels. The reasoning was that the provisions in the trust deed with respect to repair were applicable only to damage to the property after the loan was consummated, rather than to this situation, where the security was inadequate at the time the loan was made. The anti-deficiency statute[20] precludes shifting the loss of the inadequate security to the buyer under these circumstances by prohibiting his being compelled to pay over sums recovered in settlement of his fraud action. According to the supreme court the sums recovered were for personal economic loss suffered by reason of the deceit. The court conceded, however, that had the buyer received the *entire* purchase price, there would obviously have been unjust enrichment at the lender's expense; since there was no allegation that the buyer had settled for more than his own damages, the demurrer was properly sustained.

The decision is not wholly convincing, to the extent the result leaves the impression that the anti-deficiency statute—of questionable merit anyway—is being used not merely to bar the purchase money lender from enforcing a deficiency, but from asserting its proper prior claim to the security, *or substitute therefore*, itself. Justice Mosk, the lone dissenter, among all the appellate justices who reviewed the matter, perceived this essential point: "This is not a suit upon a secured debt, but a suit to prevent security from being impaired."[1] The anti-deficiency statute was irrelevant. In fact, the express provision in the trust deed relating to the restoration of the property could likewise be irrelevant. If the bor-

20. Cal. Code Civ. Pro. § 580b.

1. 68 Cal.2d at 617, 68 Cal. Rptr. at 458, 440 P.2d at 938.

rower cannot impair the lender's security, he cannot pocket a part of the fund which stands in place of the secured property in the face of the lender's prior claim thereto.

If the court in this case took a wrong turn, it was where it assumed that the settlement received by the defendant-buyer from the fraudulent seller was compensation for the buyer's personal economic loss arising from the fraud rather than an injury to the property. Granted that a fraud claim is "personal," the proposition still seems misleading. The deceit directly affected the combined interests of lender and borrower in property with respect to which the lender was given by contract certain special protection. In lieu of the property the seller was under a duty to make restitution of the purchase price or pay compensatory damages represented by the difference between the purchase price and the actual value. Any moneys advanced against either of these obligations clearly replaced the claimants' rights in the secured property. There were no separate personal claims here, but only a single property invasion claim with separate priorities. Since the borrower's rights to such money was not "personal" to him, his diversion of the substitute for the security was inconsistent with the lender's priority. It follows that the lender had a prior claim to any settlement by the seller with the buyer, until the loan would be repaid. The anti-deficiency statute would come into play only to bar the lender from holding the borrower personally liable for any sum by which the settlement fell short of the loan.

The possibility of unjust enrichment resulting from a settlement whose amount is unknown and from which the party with a primary property claim is excluded is too strong to leave the case dangling on a demurrer. Section 580b is a bar to a deficiency decree, not a means to obtain unjust enrichment.

Remedies for Mistake

Mistaken Boundaries

Relocation of a boundary line was achieved in *Roman v. Ries*[2] by a qualified decree in a quiet title suit. Defendant had acquired property adjacent to that later acquired by plaintiff. There was some doubt as to the boundary, defendant relying on the line pointed out by plaintiff's predecessor who acquiesced in defendant's improvements up to the supposed line. Following plaintiff's acquisition it was discovered that defendant's house was partially over the agreed boundary. Plaintiff sued to quiet title, but judgment was entered for the defendant under the doctrine of "agreed boundaries," which in effect awarded him all the land up to the mistaken line. On appeal, this decree was modified. It was pointed out that the defendant had changed his position in reliance on the "agreed boundary" with respect to only a part of the included land and that the remaining portion should therefore be excluded and part of the boundary re-established along the true line. The court admitted there was no precedent for a decree which allows a party to benefit from part, but not all, of an agreed boundary, but it held that such a decree is within the flexible jurisdiction of an equity tribunal.

Mistake—Restitution

The court in *E. A. Robey & Co. v. City Title Ins. Co.*[3] applied the rule that a purchaser who has paid for, but has not received, the entire amount called for in the contract, is entitled to keep what he has received and to have restitution of his overpayment.[4] The rule is subject to the provision that a fair basis for valuation can be found. Applied to the situation where there is a mistake as to the existence of a grantor's title to a portion of the property, the remedy of partial restitution may prove a desirable alternative to rescission or to the contract measure of damages stated in section 3306 of the

2. 259 Cal. App.2d 65, 66 Cal. Rptr. 120 (1968).

3. 261 Cal. App.2d 517, 68 Cal. Rptr. 38 (1968).

4. Restatement of Restitution § 225.

Civil Code, limiting recovery to the price paid and the expenses of examining title plus interest.

Mistake in Integration—Insurance Policy

An incontestibility clause does not bar an insurance company's remedy to reform a policy containing a clerical error. So held the court in *Schaefer v. California-Western States Life Ins. Co.*[5]

Remedies for Breach of Contract

Contracts for the Sale of Realty—Vendee in Default

After resolving a question as to whether a particular transaction was a license or sale and deciding in favor of the latter, the court in *Goetzke v. Hanks*[6] held that the vendor had several remedies but that unlawful detainer was not one of them.

The rule of *Freedman v. Rector, etc. of St. Mathias Parish,*[7] allowing restitution in favor of a defaulting vendee for payments made beyond damages inflicted by the breach will not be extended, according to the decision in *Smith v. Allen,*[8] to allow restitution in favor of a defaulting grantee after a foreclosure of a purchase money trust deed by a sale at which the grantor bids in the property. An opinion of the appellate court to the contrary that would have seriously disrupted the system of trust deed financing was thus overturned.

In *Butcher v. Dauz,*[9] a vendee, awarded $6,000 damages from a trial on a complaint for specific performance or damages, suffered a reversal on appeal because of his nonperformance of conditions. Retention of the award as restitution for benefits conferred in attempting to perform could not be asserted on appeal, because the complaint was framed solely on damages for breach of contract, and the issue of unjust enrichment was not presented at trial.

5. 261 Cal. App.2d 840, 69 Cal. Rptr. 183 (1968).

6. 261 Cal. App.2d 615, 68 Cal. Rptr. 150 (1968).

7. 37 Cal.2d 16, 230 P.2d 629, 31 A.L.R.2d 1 (1951).

8. 68 Cal.2d 93, 65 Cal. Rptr. 153, 436 P.2d 65 (1968).

9. 257 Cal. App.2d 524, 65 Cal. Rptr. 166 (1967).

Vendee in Default—Specific Performance—Mutuality

The defense of want of mutuality of remedy was unsuccessfully asserted by a vendee to a suit for specific performance in *Landis v. Blomquist.*[10] The contract called for part of the purchase price to be in the form of a note secured by property, *acceptable to the vendor* outside of the escrow. Defendant failed to deposit such a note. The vendee's contention was that because of the reservation by the vendor of the right of approval of the security, the vendee could not have compelled specific performance by the vendor (section 3386, Civil Code). The primary reason for the court's rejection of the defense was that the mutuality rule is not applicable where the unavailability of the remedy is the result of the defendant's own omission. Also, the fact that the vendors instituted the present suit cured any want of mutuality of obligation and placed them within the jurisdiction of the court, so performance of any protective conditions could be assured. The decision indicates an unwillingness to indulge in an overly technical application of the much criticized mutuality of remedy rule in California.

Contracts for the Sale of Chattels—Damages—Lost Profits

Applying the proposition tha damages based on a difference between the contract price and the market price do not adequately compensate a known middleman, who is contemplating a profit, the court in *Dulien Steel Products, Inc. v. A. J. Industries, Inc.*[11] awarded the plaintiff, a salvage operator interested in dismantling the famous Alaska-Juneau mine equipment for resale, damages based on lost profits.

The element of "lost net profits" was also prominent in the determination of damages in *Dallman Co. v. Southern Heater Co.*[12] The defendant, a manufacturer, agreed to sell

10. 257 Cal. App.2d 533, 64 Cal. Rptr. 865 (1967).

11. 264 Cal. App.2d —, 70 Cal. Rptr. 787 (1968).

12. 262 Cal. App.2d 582, 68 Cal. Rptr. 873 (1968). Another 1968 case discussing recovery of "lost profits" is Macmorris Sales Corp. v Kozak, 263 Cal. App.2d 430, 69 Cal. Rptr. 719, which involved the breakup of a newly

large quantities of hot water heaters bearing plaintiff's private brand name to the plaintiff, a major plumbing distributor. Much of the plaintiff's business was with housing developers; individual installations carried warranties to the purchaser of each home. The agreement also provided that the defendant-manufacturer would establish and maintain a number of service facilities close to several of the plaintiff's places of business in northern California. Defendant's failure of performance inevitably caused homeowner dissatisfaction which in turn caused the major subdividers and builders to cease doing business with plaintiff. The complaint was for loss of business profits and goodwill; it resulted in a judgment for $262,870.

On appeal, among other objections, defendant contended that the lower court entered a finding of fact that the damages represented lost "net profits" and were thus inconsistent with the claim for "loss of customers and business good will." The appellate court refused to make any distinction between the two. Another objection concerned the introduction of evidence with regard to gross profits, coupled with testimony of plaintiff's president that there was little change in overhead expenses such as salaries, accounting, rents and sales costs after plaintiff's breach. Again the appellate court refused the objection. It cited several California cases holding that, although gross profits are not generally recoverable in breach of contract actions, in some circumstances, where plaintiff can show his operating expenses are fixed and unaffected by the contract breach, his showing of diminished gross profits is permissible since they are the equivalent of the diminished net profits caused by the breach.

Contracts for the Sale of Stock—Specific Performance

A somewhat novel substitutional decree was entered in *Lister v. Sorge.*[13] The plaintiff sought specific performance of

formed venture in the used car business. The usual weakness of the evidence as to lost profits where there has been no past experience was one of the reasons for the reversal of an award of damages.

13. 260 Cal. App.2d 333, 67 Cal. Rptr. 63 (1968).

a stock option offered by a management group to induce him, as a former president, to return to active participation in the business. During the pendency of the proceedings (which also involved reformation of the option to include stock in a subsidiary), the corporation sold all its assets. In lieu of the stock subject to option defendant now held shares in another corporation, plus some promissory notes received in the course of the liquidation of the subsidiary. The court ordered the substituted property transferred. Probably the circumstances justified this admittedly unusual decree, although it might be pointed out that the usual basis for equitable jurisdiction to compel delivery of stock disappears when the specific stock is not available.

Construction Contracts

In prolonged litigation the accumulation of claim items such as costs, attorney's fees and interest may become as important financially as compensatory damages themselves. Some guidelines as to these items were laid down in *Distefano v. Hall*,[14] a case centering upon a dispute over the construction of a 22-unit apartment house in Santa Clara. The dispute resulted in two trials and a trip to the appellate court. Defenses of fraud and faulty construction were vigorously presented. The final judgment was $12,560 in favor of the plaintiff.

— The Problem of Costs

To encourage settlements, section 997 of the Code of Civil Procedure provides that a defendant may make an offer of settlement any time before judgment. If not accepted, the offer is considered withdrawn and cannot be introduced in evidence. However, if the plaintiff refuses the offer and then fails to obtain a more favorable judgment, he cannot recover costs and must pay defendant's costs from the time of the offer. In *Distefano*, defendant had made an offer of settlement for $20,000; since the judgment was for $12,560, he

14. 263 Cal. App.2d 380, 69 Cal. Rptr. 691 (1968).

argued that he should be awarded costs. However, the defendant had made a later offer of settlement for only $10,000. Applying elementary contract law, the court held that the later offer extinguished the prior one and therefore affirmed denial of costs to the defendant.

— *The Problem of Attorneys' Fees*

In *Distefano,* the plaintiff was awarded attorneys' fees under the contract's boilerplate provision, that in case of suit, "the losing party shall pay to the successful party . . . reasonable attorneys' fees."[15] Defendant claimed such fees for himself pointing out that the plaintiff's original claim for $128,458 was scaled down to $39,382 by the second trial and resulted in a judgment of only $12,560. Thus, on an absolute scale the defendants were as successful as the plaintiff. The court rejected this contention and held that the successful party was the one with the *net* judgment, even if the other was, in a sense, successful in securing a judgment on a counterclaim.

— *The Problem of Pre-Judgment Interest*

Pre-judgment interest is recoverable when the sum due is ascertained or ascertainable.[16] Plaintiff cited authority that the sum is ascertainable if a plaintiff has furnished a defendant with data from which the amount due can be calculated, even allowing for disputes as to agreed price. Plaintiff asserted that ten years earlier he had turned over all payroll receipts, invoices, and cancelled checks in his possession. The court, however, held that the mere fact that defendant was given such data was not enough to impose pre-judgment interest; major issues of law as well as fact could be determined only by trial. This conclusion suggests that pre-judgment interest allowance remains largely a matter of judicial discretion but that the award depends less on the precision of factual data available than on the complexity of the legal issues presented.

15. 263 Cal. App.2d at 385, 69 Cal. Rptr. at 695–696.

16. Cal. Civ. Code § 3287.

Contracts for Services—Real Estate Brokers

How exclusive is an "exclusive and irrevocable listing" with a real estate agent? Not very, if the agent fails to produce "lookers." In such event the owner is entitled to rescind or cancel the listing for failure of consideration, according to *Coleman v. Mora.*[17] Under the circumstances it was deemed unnecessary to distinguish between an "exclusive agency" and an "exclusive right to sell," since the property was promptly resold through another agent rather than by the owner himself.

Contracts of Guaranty—Effect of Anti-Deficiency Statute

A lender whose action against the borrower on a secured note is affected by anti-deficiency legislation may gain an additional remedy by having the note guaranteed by a third party. This device has certain limitations as indicated in *Union Bank v. Gradsky,*[18] wherein the lender first held a nonjudicial sale of the security and then sued the guarantor of the note for the deficiency. It was held that by electing to proceed in this fashion, the lender had destroyed the guarantor's right of subrogation against the principal obligor, and his remedy against the guarantor on the note was barred.

Contracts to Insure—Breach of Agreement to Obtain Insurance

Subrogation principles also have an effect upon available remedies against one who has broken a contract to obtain insurance covering a loss subsequently incurred by the plaintiff.

It is generally held in the United States that an insurer may not have subrogation to contract claims that the insured might otherwise assert to obtain reimbursement for his loss. This rule is simply the other side of the coin expressing the rule which considers collateral sources in fixing compensatory

17. 263 Cal. App.2d 137, 69 Cal. Rptr. 166 (1968).

18. 265 Cal. App.2d —, 71 Cal. Rptr. 64 (1968). For further discussion of this case, see Lazerow, REAL PROPERTY, in this volume.

Cal Law Trends and Developments, Vol. 1969, Iss. 1 [1969], Art. 5

damages. Application of these principles determined the outcome in *Patent Scaffolding Co. v. William Simpson Construction Co.*[19] The general contractor (Simpson) agreed to obtain fire insurance covering the subcontractor's (Patent) work and materials at the job site. Simpson broke the contract. Fire loss occurred and Patent's own insurers paid. The present action was brought nominally by Patent for breach of contract, but it was openly stated that the genuine plaintiffs were Patent's insurers. Judgment given in favor of Patent was reversed on appeal. It was reasoned that, since Patent had already received payment for its loss, it sustained no damage by reason of defendant's breach of contract and that there was consequently no cause of action. In other words, Patent's insurers were not subrogated to the claim for breach of contract. The payment by one of two parties contractually bound to indemnify does not create a superior equity in favor of the paying as against the non-paying indemnitor so as to create an equitable right of subrogation for unjust enrichment.

Stated conversely in terms of the "collateral source" doctrine, the result here was that a tortfeasor is not entitled to credit for a property insurer's payment of a loss to the plaintiff, but that a contract breaker who fails to provide the agreed protection against fire loss is entitled to the benefit of the plaintiff's fire insurance.

Remedies on Contracts Nominally Unenforceable Because of the Statute of Frauds

In California, the doctrine of estoppel to assert the statute of frauds is routinely employed to allow recovery of damages for breach of contract, as well as the remedies of restitution or specific performance in equity to which a plaintiff may be limited in less permissive jurisdictions.[20] However, this estoppel is not created by a mere promise to put the contract

19. 256 Cal. App.2d 506, 64 Cal. Rptr. 187 (1967).

20. E.g., Dallman Co. v. Southern Heater Co., 262 Cal. App.2d 582, 68 Cal. Rptr. 873 (1968); Macmorris Sales Corp. v. Kozak, 263 Cal. App.2d 430, 69 Cal. Rptr. 719 (1968).

in writing.[1] Also, as to certain agreements (notably that of employment of brokers in real estate sales) the contract is absolutely unenforceable unless in writing; not even a quasi-contractual remedy for the reasonable value of the services rendered in reliance on the oral agreement is maintainable.[2] In *Porporato v. Devincenzi*,[3] a typical case of an oral agreement to devise realty, the plaintiff successfully pursued the remedy of quasi-specific performance in lieu of the remedies of restitution or damages.

1. Tomlins v. American Insurance Co., 258 Cal. App.2d 525, 66 Cal. Rptr. 92 (1968).

2. Wm. E. Doud & Co. v. Smith, 256 Cal. App.2d 552, 64 Cal. Rptr. 222 (1967).

3. 261 Cal. App.2d 670, 68 Cal. Rptr. 210 (1968).

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